

ORIGINAL

Before the  
Federal Communications Commission  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

**BELLSOUTH'S COMMENTS ON FOURTH FURTHER NOTICE**

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## SUMMARY

The Commission cannot should not declare network facilities used to provide traditional special access and dedicated switched transport services to be UNEs until doing so is consistent with the 1996 Act and the Commission's own policies. Doing so before that time would conflict with two sets of basic and essential policies, both embodied in the 1996 Act. The first set concern universal service and access charge reform, the second local competition. Transforming special access into UNEs threatens universal service because it would cause a substantial wealth transfer from firms with provider of last resort obligations to firms without those obligations. Switched access subsidies would fall as traffic moves to access UNEs re-priced at half-off TELRIC prices. Special access revenues would decline as IXC's strive to reap the savings of substituting UNEs for special access services.

Once a universal service solution is fully implemented, using UNEs to provide access services would be generally consistent with universal service. The Commission must then determine what special access network facilities meet the 1996 Act's unbundling standards. The realities of special access show that no broad requirement to unbundle special access facilities could meet the requirements of section 251(d)(2) or the Commission's unbundling policies. Fifteen years of CAP and CLEC investment in facilities-based bypass of incumbent LEC access facilities has created "practical, economic and operational" alternatives to incumbent LEC facilities, as the revenues of these providers demonstrates. These alternative facilities coupled with the fact that

alternative providers have already won the majority of customer relationships means that the policy bases articulated by the Commission for creating UNEs are simply absent here.

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Pursuant to the Commission's *Fourth Further Notice*<sup>1</sup> and its *Supplemental Order*,<sup>2</sup> BellSouth Corporation (BellSouth) submits these comments on behalf of itself and BellSouth Telecommunications, Inc.

**I. INTRODUCTION**

In this proceeding, the Commission seeks to explore whether there are "any legal or policy ramifications of applying our unbundling rules in a way that could 'cause a significant reduction of the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform.'" *Supplemental Order* at ¶ 3, quoting *UNE Remand Order* at ¶ 489. The Commission emphasized the breadth of this proceeding by requesting comment on whether "there is *any* basis in the statute or our rules" to decline to provide UNEs as a substitute for special access services. *Supplemental Order* at ¶ 6 (emphasis added). The Commission also seeks to refresh the

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<sup>1</sup> Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Nov. 5, 1999) ("UNE Remand Order").

<sup>2</sup> Supplemental Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Nov. 24, 1999) ("Supplemental Order").

record in its *Shared Transport Order and Further Notice* proceeding.<sup>3</sup> *UNE Remand Order* at ¶ 496. In the *Shared Transport Order and Further Notice*, the Commission held that transport UNEs could be used to provide access services only to the requesting carrier's local exchange service customers. The further notice in that proceeding sought comment on whether it would be appropriate for requesting carriers to gain access to transport UNEs in order "to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service." *Shared Transport Order and Further Notice* at ¶ 496.

The legal and policy ramifications of allowing the blanket substitution of UNEs for special access and other dedicated transport services (as defined at pages 9-10 below) are broad, deep and counter to the Commission's universal service, access charge and local competition goals. Special access services are provisioned and sold in a radically different environment from that of local exchange services. Exporting the Commission's broad UNE policies designed to create competition for local exchange services to special access would undo years of Commission effort to create a regulatory environment favoring access competition. It would simultaneously undo fifteen years' worth of competitive access provider (CAP) investment made to bring about the very facilities-based competition that the Commission sought to favor, harm universal service and undermine access charge reform. The policy basis for creating UNEs as an entry path into the local exchange market is simply absent when it comes to already competitive special access services.

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<sup>3</sup> Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* ("Shared Transport Order and Further Notice"), 12 FCC Rcd 12460 (1997), aff'd sub nom. *SBC v. FCC*, 153 F.3d 597 (8<sup>th</sup> Cir. 1998).

The Commission is not writing on a blank slate here; in order to support universal service and access reform and to maintain a favorable climate for local exchange service competition, it has consistently concluded that when it comes to UNEs, maintaining a link between local exchange and exchange access services is the best approach. There is no policy or legal reason for the Commission to alter course now, in direct conflict with its local competition, universal service and access reform policies, in order to meet IXC demands for a special access windfall. The Commission should continue to maintain the link between access UNEs and the provision of local exchange service until a complete package of universal service and access reform initiatives is fully implemented.

In specific geographic areas, the Commission should recognize that fifteen years' worth of CAP and CLEC investment in access facilities means that carriers can -- and do -- offer these services without any need for incumbent LEC facilities. Carriers in those areas would not be impaired without incumbent LEC special access UNEs. In those areas, the Commission should find that network elements used to provide special access services do not meet the standards for unbundling.

Workable distinctions between special access-type services and local exchange service can be drawn in several ways. The Commission adopted one in the *Supplemental Order* that ensured there would be no ill-effects on local exchange or advanced services competition. A potentially preferable distinction may look to whether a voice circuit terminates on the trunk side of a switch performing a local switching function. Advanced services would be distinguished by looking to whether a circuit terminates in a DSLA or an ATM switch. Circuits that do not terminate in a local switch or a DSLAM or ATM would fall into the special access category. Non-special access circuits would be

available as UNEs, ensuring that UNEs would be available for requesting carriers seeking to offer local exchange service or advanced data services.

## **II. REVENUE IMPLICATIONS OF CREATING AN IXC ENTITLEMENT TO SPECIAL ACCESS AT UNE RATES**

The *Special Access Report* attached to USTA's Comments in this proceeding provides a concise and insightful summary of the development of special access competition and the success alternative providers have had in winning revenues. That report also analyzes the likely effect on incumbent LEC revenues of creating an IXC entitlement to special access at UNE prices. *Special Access Report* at 13-16. The Commission does not ordinarily engage in mandating unadorned wealth transfers, and should not do so here in particular where such regulatory action would interfere with a vibrant market in special access alternatives.

## **III. THE SPECIAL ACCESS ENVIRONMENT DIFFERS GREATLY FROM THE LOCAL EXCHANGE ENVIRONMENT**

The environment in which special access services are delivered differs greatly from the local exchange environment for a number of reasons, discussed below. The key reason is that access competition began well before the 1996 Act. The economics of providing dedicated connections between carriers and densely concentrated large businesses easily justified construction of facilities. The build-out of substantial alternative networks reflects this basic economic fact. In addition, it is the IXCs, not the incumbent LECs that control the existing base of end user customers. Special access providers have moved well past the need for UNEs, as proven by the simple, irrefutable fact that the market has awarded a large share of special access revenues to alternative providers.



ALTS sums up the state of special access competition: “[t]here are *not* significant issues for new entrants relative to dedicated services.”<sup>4</sup> These basic market facts should drive the Commission’s analysis of the role that UNEs should play in providing access.

#### **A. Special Access Services**

“Special access services” as used here includes a number of distinct services sharing common characteristics. “Special access services do not use local switches; instead they employ dedicated facilities that run directly between the end user and the IXC’s point of presence.” *Pricing Flexibility Order* at ¶ 8.<sup>5</sup> The connection may run on incumbent LEC or alternative facilities from the end-user all the way to the POP. In some cases, incumbent LEC facilities provide transport to an intermediate place between the end user and the POP, often a collocation space. In this case, an alternative provides transport to the POP. Private line services share the same essential characteristic of establishing dedicated connections between high-volume end-users.<sup>6</sup>

Other dedicated transport services and facilities share common characteristics with special access. The Commission has grouped these other services into the category of “dedicated transport services,” consisting of “entrance facilities, direct-trunked transport, and the dedicated component of tandem-switched transport. *Pricing Flexibility Order* at ¶ 24 n.54. Like special access, the services and facilities in the dedicated

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<sup>4</sup> ALTS Comments, *In the Matter of Local Competition Survey*, CC Docket No. 91-141, filed June 8, 1998, at 9 (emphasis added).

<sup>5</sup> *Access Charge Reform: Price Cap Performance Review for Local Exchange Carriers, etc.*, Fifth report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262 et al. (rel. Aug. 27, 1999) (*Pricing Flexibility Order*).

<sup>6</sup> *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd 4712, ¶ 2 (1993)(Special access “primarily involves the provisioning of so-called ‘private lines,’ that is, facilities or network transmission capacity dedicated to the use of an individual customer”).

transport group establish dedicated connections between high-volume locations and are subject to the same competitive pressures. The Commission has treated special access and these dedicated transport services as a common set. *Pricing Flexibility Order* at ¶ 24

Thus, here we use “special access” to describe the family of services and associated facilities used to provision dedicated connections between and among carriers and high-volume end-user customers, including special access, dedicated transport and private line services.

### **B. Construction Of Alternative Facilities**

As set out in the *Special Access Report*, competitive access providers entered this business in 1984, when Teleport began constructing a fiber-optic network in Manhattan. In 1986, the Commission formally preempted “any *de facto* or *de jure* barrier to entry” into the provision of exchange access services.<sup>7</sup> The Commission has long recognized growing competition in special access services.<sup>8</sup> In 1992, the Commission recognized the already extensive build out of alternative local fiber networks, finding that DS1 and DS3 special access services were subject to competition and that this competitive pressure was growing rapidly.<sup>9</sup> The Commission recognized that the basic economics favored special access competition because “[t]raffic density is greater, and costs lower, in most

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<sup>7</sup> *Cox Cable Communications, Inc.*, Memorandum Opinion, 102 FCC 2d 110 (1985), *vacated as moot*, 61 Rad. Reg. 967 (1986).

<sup>8</sup> See *Special Access Report* at Table 2 (collecting FCC findings regarding special access competition).

<sup>9</sup> See, *In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369, 7451-55 and n. 412 (1992) (*Special Access Order*) (“competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection”); *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-

central city areas where large concentrations of high volume customers are located.”

*Special Access Order*, 7 FCC Rcd at 7452, ¶ 175.

Since that time, as the Commission predicted, the construction of *local* fiber networks has exploded, creating competitive alternatives to incumbent LEC special access facilities in a broad array of urban markets. Competitive local fiber rings currently exist in 149 of the top 150 MSAs. Most larger cities have multiple alternatives to incumbent LEC transport. For example, 47 of the top 50 MSAs have three or more alternative fiber rings to those of incumbent LECs.<sup>10</sup>

BellSouth’s maps and data on collocated fiber providers highlight the breadth and depth of alternative access facilities in the region it serves. The maps show alternative provider fiber networks in 12 cities in BellSouth’s region.<sup>11</sup> While incomplete due to lack of information from CLECs, these maps illustrate the typical fiber ring networks.<sup>12</sup> These networks run through downtown central business districts and suburban office parks. The networks extend to high-volume larger business customers and connect them to carrier locations. BellSouth’s alternative fiber network maps illustrate that alternative

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141 (*Transport Phase I*), *Second Report and Order and Third Notice of Proposed Rulemaking*, 8 FCC Rcd 7374, 7423-25 (1993) (*Switched Transport Order*).

<sup>10</sup> P. Huber and E. Leo, *UNE Fact Report*, Prepared for Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and US West, attached to the Comments of the United States Telephone Association, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, filed May 26, 1999 at Appendix B. No party has taken issue with the accuracy of the *UNE Fact Report*’s city-by-city listing of alternative transport facilities.

<sup>11</sup> BellSouth Comments filed May 26, 1999, at Appendix B.

<sup>12</sup> These maps were based on BellSouth independent data collection efforts. The maps do *not* include the often ubiquitous fiber facilities of cable providers. Comparing the maps to the number of fiber-based collocators discussed immediately below illustrates that there are many more transport providers operating in particular cities than is illustrated on the maps.

local networks generally connect the points of telecommunications density within any geographic area.

The fact that the Commission has not systematically collected CLEC information handicaps the ability to peg the scope of CLEC alternative facilities. *See*, 1998 Local Competition Survey at 3 (“the Commission, however, gathers almost no systematic information from new entrants”); *Pricing Flexibility Order* at ¶ 96 (Commission effort to assess competition “hampered by the lack of verifiable data concerning competitors’ revenues and facilities. Unlike incumbent LECs, competitors are not subject to Commission reporting requirements, and they are often unwilling to provide this information voluntarily”).

Although some IXC carriers describe the scope of alternative builds as limited to entrance facilities connecting IXC POPs and incumbent LEC serving wire centers,<sup>13</sup> this is clearly wrong, as a quick look at the maps illustrates. Alternative providers have not artificially constrained their builds out as this argument would have it. Rather, their business plans have always focused on providing links to POPs, central offices and the maximum number of large businesses within an area – providing connections between “large concentrations of high volume customers” in the Commission’s words. Thus, NextLink “design[s] each network to connect the maximal number of businesses, long distance carriers’ points of presence and ILEC principal central offices in the area to be

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<sup>13</sup> *MCI WorldComm UNE Remand Comments* at 64. ALTS correctly points out that alternative providers focused on constructing fiber facilities, not just to POPs, but to “connect IXCs and their large business customers.” Daniel Kelly, “Deregulation of Special Access Services: Timing is Everything,” ALTS White Paper, Docket No. 96-262, filed June 25, 1999 at 7-8 (ALTS White Paper). Before 1992, when the Commission required incumbent LECs to provide collocation in their wire centers, alternative providers focused on constructing and operating the direct links between end users and

served.”<sup>14</sup> GST Telecommunications “designs its networks with a ring architecture with connectivity to the ILEC’s central offices, POPs of long distance carriers and large concentrations of telecommunications intensive end-users.”<sup>15</sup> Similarly, when ICG builds local fiber facilities it “designs a ring architecture with a view toward making the network accessible to the largest concentration of telecommunications-intensive businesses in a given market.”<sup>16</sup>

IXCs have particular flexibility to substitute alternative provider local networks for incumbent LEC facilities by establishing POPs on fiber alternatives. For example, Time Warner Telecom “provides dedicated transport between local exchange carrier central offices and customer designated POPs of an IXC” as well as lines “linking the Points of Presence of one IXC or the POPs of different IXCs in a market, allowing the POPs to exchange transmissions for transport.”<sup>17</sup> Similarly, e.spire provides “alternative local access to long distance carrier networks.”<sup>18</sup> IXCs also have considerable flexibility to locate and link their POPs creating extensive additional network alternatives over their own facilities.<sup>19</sup>

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POPs that MCI WorldCom claims are missing. *Switched Access Order*, 7 FCC Rcd 7369 (1992).

<sup>14</sup> NextLink Communications, Inc. Form 10-K dated March 29, 1999 at 11.

<sup>15</sup> GST Telecommunications, Inc. Form 10-K dated March 12, 1999, at 2.

<sup>16</sup> ICG Communications, Inc. Form 10-K dated March 31, 1998, at 10.

<sup>17</sup> Time Warner Telecom LLC Form 10-k dated March 31, 1999 at 6.

<sup>18</sup> E.spire Special Access Service Marketing Information at 1, available at <[http://www2.espire.net/products/voice/special\\_access.cfm](http://www2.espire.net/products/voice/special_access.cfm)>

<sup>19</sup> IXCs have acted to more than fulfill this potential by, among other things, deploying substantial numbers of POPs. For example, the Big Three IXCs collectively have established 244 POPs in Atlanta, 302 in S.E. Florida, 57 in Charlotte, NC and 38 in Birmingham, AL. IXCs can provide transport among POPs over their own networks or obtain it through alternative provider services linking POPs, like the POP-to-POP service provided by Time Warner Telecom described immediately above.

BellSouth has also submitted data on the presence of alternative transport facilities and collocation in BellSouth's wire centers.<sup>20</sup> These data show that alternative transport facilities are present in BellSouth's urban wire centers, sometimes in large numbers<sup>21</sup> The number of alternatives generally far exceed the number of networks illustrated on the maps. For example, eight BellSouth wire centers in Miami, Florida, have ten or more independent fiber transport facilities. One of these Miami wire centers has eighteen. Four BellSouth wire centers in Charlotte, N.C. have ten or more alternative facilities. Atlanta has sixteen offices with three or more alternatives. Jacksonville, Florida has thirteen wire centers with three or more alternatives.

**C. Alternative Access Providers Have Taken A Substantial Share Of The Access Business**

Alternative local networks are providing real, everyday alternatives that are used everyday in place of incumbent LEC facilities and services. In fact, CLECs earned about \$2.5 billion in 1998 providing special access and private line service. That \$2.5 billion represents about 30 percent of the amount earned by the Bell companies and GTE providing the same services.

Alternative providers' revenues and shares are growing rapidly. In 1999, CLECs will have grown this revenue to about \$5.6 billion, an increase of over \$2 billion dollars in one year. In 1999, CLECs will have won roughly one-third of special access revenues,

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<sup>20</sup> BellSouth August 16, 1999 Ex Parte.

<sup>21</sup> Competitive transport facilities present in BellSouth's wire centers generally consist of multiple fiber sheaths, each containing 24 strands of fiber. The multiple sheaths indicate that the typical competing provider is using a ring architecture providing at least some route diversity. The number of strands indicates that the fiber facility has the capability to carry very large amounts of traffic.

demonstrating beyond objection that the market has endorsed their facilities and services as providing real alternatives.<sup>22</sup>

#### **D. Who Buys Special Access Services**

In contrast to the mass market for local exchange services, “the vast majority of purchasers of interstate access services are telecommunications carriers, not end users.” *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873. The remainder of the customer universe is sophisticated “large businesses, not residential or small business end users.” *Pricing Flexibility Order* at ¶ 142. “Access services,” the Commission has noted, “are designed for, and sold to, IXC’s as an input component to the IXC’s own retail service.” *UNE Remand Order* at ¶ 874. In the special access world, it is the large IXC’s and other alternative providers that have the established customer base, not the incumbent LEC’s.

#### **IV. THE COMMISSION IS UNDER NO LEGAL COMPULSION TO CREATE AN IXC ENTITLEMENT TO SPECIAL ACCESS AT UNE PRICES, IXC ARGUMENTS TO THE CONTRARY NOTWITHSTANDING**

The largest IXC’s have tried to make a case that the Commission is under some legal compulsion to provide them a financial windfall by transforming the special access circuits they have ordered from incumbent LEC’s to UNEs.<sup>23</sup> The transformation they seek would simply reduce the bill for a circuit by roughly 50 percent, no other aspect of the service would change, and certainly no beneficial effect on local competition would emerge. As detailed below, the Commission has ample legal authority to continue its policy of linking the availability of UNEs for access services to the provision of local exchange service. Section 251(c)(3) expressly permits the Commission to establish such a linkage and to impose “just, reasonable and non-discriminatory” conditions on UNEs.

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<sup>22</sup> *Special Access Report* at 3 (citations omitted).

Section 251(d)(2) provides further support, as it expressly contemplates that UNEs may be available for some of the services a requesting carriers seeks to offer and not for others. The *UNE Remand Order*'s treatment of circuit switching demonstrates this. At an absolute minimum, the Commission can determine how combinations of UNEs – an entitlement that it created -- may be used.

**A. The Commission Has Consistently Linked The UNE Provision Of Access Services To Local Exchange Service For Local Competition Policy Reasons**

The Commission has consistently maintained a link between the availability of UNEs for access services and the provision of local exchange service. The Commission has established this linkage for UNE loops, switches and transport. Thus, in the *Local Competition Order*,<sup>24</sup> the Commission explained that it expected carriers to use unbundled loops to provide both local exchange and exchange access services, not simply for access bypass. *Local Competition Order*, 11 FCC Rcd at 15679, ¶¶ 356-57. One key motivation for the condition that loops be used for both access and local exchange service came from AT&T and the Department of Justice. The Commission noted their point that “new entrants will need the revenue streams from both [local exchange and exchange access] services to support the high cost of constructing competing local exchange facilities.” *Id.* at 15672-73, ¶ 346.

The Commission supplied the other key support for the linkage by in rejecting a proposal that loops be defined in functional terms. The Commission held that it would be

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<sup>23</sup> AT&T August 19, 1999 Ex Parte; MCI WorldCom August 20, 1999 Ex Parte.

<sup>24</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996)(*Local Competition Order*), subsequent history omitted.



“inappropriate” to give IXCs the right to use UNE loops solely for terminating their interexchange services, because that access would prevent another carrier from using the same facility for local services. *Local Competition Order*, 11 FCC Rcd at 15693, ¶ 385. Linking the use of loops for local exchange and exchange access ensures that UNE loops will be available for carriers seeking to provide local exchange service.

The Commission reached the same conclusion that local exchange and access services should be linked in its consideration of the local switching element. Thus, in its *Reconsideration Order*,<sup>25</sup> the Commission held that a “requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service.” *Reconsideration Order*, 11 FCC Rcd at 13049, ¶ 13 (emphasis added).

As far as dedicated and shared transport UNEs, the Commission held that a requesting carrier may use those UNEs to provide “access services to customers to whom it provides local exchange service.” *Shared Transport Order*, 12 FCC Rcd at 12483, ¶ 38. The Commission’s holding clearly applied to the dedicated transport elements used to provide special access services. *Id.* at 12462, ¶ 3 (Further NPRM seeks “comment on whether requesting carriers may use dedicated transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service”).

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<sup>25</sup> Order on Reconsideration, 11 FCC Rcd 13042 (1996) (“*Reconsideration Order*”), vacated in part on other grounds, *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), aff’d in part, rev’d in part, AT&T v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

The Commission sought further comment on whether it would be advisable to change its rule and allow requesting carriers to use unbundled transport elements to provide access services to customers to whom they did not provide local exchange service. *Id.* at 12462, ¶ 3. The Commission has not yet found it appropriate to do so.

**B. Section 251(c)(3) Expressly Allows Just, Reasonable, And Nondiscriminatory Conditions On UNEs**

Section 251(c)(3) expressly allows “just, reasonable, and nondiscriminatory” conditions on UNEs. 47 U.S.C. § 251(c)(3). There are at least three policy goals that support a condition linking access to UNE loops, switching and transport to the provision of both local exchange and access service. Local competition, universal service and access charge reform goals are each independently sufficient to meet section 251(c)(3)’s “just, reasonable, and nondiscriminatory” standard.

The Commission has already articulated a strong local competition policy rationale for a condition linking UNEs to the provision of both local exchange and exchange access services, as discussed immediately above. Whether it is characterized as an eligibility requirement, a determination of the scope of the unbundling obligation imposed, or a condition on access should be irrelevant.<sup>26</sup> Allowing requesting carriers to lay separate claim to facilities as UNEs used solely to capture access revenues would deny those necessary revenues, and necessary facilities, to carriers genuinely interested in providing local exchange service. Doing so is likely to harm the development of local competition, as both AT&T and the Department of Justice have pointed out. The Commission’s judgment that allowing particular carriers to reserve facilities for access

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<sup>26</sup> Although a number of parties have adopted a “use restriction” label for the Commission’s practice, that label is fundamentally inaccurate. That link is

bypass would harm the development of local competition was, and continues to be, accurate, and is more than sufficient to meet the legal standard set out in section 251(c)(3).

Although additional reasons to justify this condition are legally unnecessary to meet section 251(c)(3), requiring carriers that use UNEs for access to serve local end users meets the “just, reasonable, and nondiscriminatory” test for two additional reasons: it protects incumbent LECs’ “receipt of compensation” from access charges as required by section 251(g), and it safeguards universal service until new funding mechanisms are in place. See Competitive Telecomms. Ass’n v. FCC, 117 F.3d 1068, 1074-75 (8<sup>th</sup> Cir. 1997) (*CompTel*)(explaining that “Congress did not intend that universal service should be adversely affected by the institution of cost-based rates” for UNEs); Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 437 (5<sup>th</sup> Cir. 1999) (“defer[ing] to the agency’s reasonable judgment about what will constitute ‘sufficient’ support during the transition period from one universal service system to another”). Nothing in section 251 or any other provision of the 1996 Act precludes the Commission from taking such considerations into account. As the Commission itself has explained, section 251(g) illustrates Congress’s awareness of the immediate, practical need to continue access charge recoveries that fund universal service, notwithstanding incumbent LECs’ interconnection and unbundling duties under section 251. Local Competition Order, 11 FCC Rcd at 15867, ¶ 726.

In its Local Competition Order, the Commission stressed that the UNE provisions of section 251, access charges, and universal service issues are “intensely interrelated.”

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fundamentally an eligibility criterion. Once it is met, a requesting carrier is free to “use” the UNE for any telecommunications purpose, without any restriction whatsoever.

Id. at 15507, ¶ 8. Universal service reform pursuant to section 254 is necessary to eliminate regulatory pricing distortions -- such as recovery of fixed network costs through traffic-sensitive access charges -- that impede full competition. See id. at 15506-08 15863, ¶¶ 5, 9, 718. The Commission pledged to do this "by completing our pending universal service proceeding to implement section 254 ... and by addressing access charge issues." Id. at 15862, ¶ 716. The Commission recognized, however, that "implementation of the [UNE] requirements of section 251 now, without taking into account the effects of the new rules on our existing access charge and universal service regimes, may have significant, immediate, adverse effects that were neither intended nor foreseen by Congress." Id. The Commission accordingly adopted a temporary plan that required carriers to pay access charges to the incumbent LEC when they used UNEs to provide access services to their local customers. Id. at 15864-66, ¶¶ 772-725.

The Commission cited "ample legal authority" to implement its plan, including sections 4(i) and 251(g) of the Communications Act. Id. at 15866-67, ¶ 726. Furthermore, the Commission rounded its legal analysis by noting that allowing carriers to purchase UNEs as a substitute for access services, and thereby avoid contributing to universal service, "would be undesirable as a matter of both economics and policy." Id. at 15863, ¶ 719. "[C]arrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and our universal service scheme, rather than unfettered operation of a competitive market." Id. The Commission resolved not to "allow[] such a result before we have reformed our universal service and access charge regimes." Id.

On review, the Eighth Circuit strongly agreed with the Commission that imposing access charges on UNE-based access providers was consistent with the statutory scheme. Competitive Telecoms. Ass'n ("CompTel") v. FCC, 117 F.3d 1068. The 1996 Act "plainly preserves" access charges, id. at 1072, and it was reasonable for the Commission temporarily to balance the statutory command of cost-based UNE pricing with "another major purpose of the Act" - supporting universal service, id. at 1074. That principle dictates a condition restricting the use of UNEs to bypass interstate access charges during the period while this Commission eliminates universal service support from federal access charges. See generally Texas Office of Pub. Util. Counsel, 183 F.3d 393.

Allowing CLECs (or interexchange carriers themselves) to purchase loops and transport at TELRIC rates as a substitute for tariffed access services would render academic federal and state access charges. Interexchange carriers would not pay the tariffed charges, because they could obtain access over the incumbent's same network at a lower rate, while the access provider (either a CLEC or the interexchange carrier) simultaneously earned a large profit by arbitraging the difference between regulated access rates and TELRIC-based UNE prices. High-volume long distance customers would have their exchange access provided over UNEs, while the incumbent LEC would be left to carry local traffic without earning any access revenues. The result would be the end of access charges as a viable means of recovering the costs of universal service, even though the incumbent still would bear the very same expense of providing local dialtone services.

Such roundabout termination of the access charge regime – prior to actual elimination of implicit universal service subsidies at either the federal or the state levels –

would be inconsistent with the 1996 Act. The Commission has acknowledged that Congress did not intend that universal service be compromised by elimination of incumbent LECs' access charge revenues. Local Competition Order, 11 FCC Rcd at 15862, ¶ 716. Accordingly, implementation of section 251 must "tak[e] into account the effects of the new rules on [the] existing access charge and universal service regimes." Id. This is, in fact, a statutory requirement, for section 251(g) preserves existing access charge recoveries until the FCC expressly establishes a new regime. 47 U.S.C. § 251(g).

Nor would consumers, having been saddled with interexchange carriers' prior universal service obligations, receive offsetting benefits in the form of more local competition. The whole issue is whether CLECs and interexchange carriers may provide only access bypass, without also providing local exchange service. Indeed, access bypass would actually retard local competition. Unbundled facilities of the incumbent LEC - having been found to satisfy the necessity and impairment tests of section 251(d)(2) -- would nevertheless be unavailable to CLECs that want to provide dialtone service, as discussed above. The only new local "competition" would come where it is least needed: access services were competitive in most major markets even before the 1996 Act, due to the entry of competitive access providers who themselves have thrived by undercutting access charges that contain implicit subsidies. See Local Competition Order, 11 FCC Rcd at 15506, ¶ 5 (noting competitive access providers' ability to arbitrage incumbent LECs' access prices). All that would be accomplished by UNE-based access bypass would be substitution of a new form of competitive entry (using the incumbent's own network, obtained at TELRIC cost) for an established one (using competitive networks). Such a move away from competition between alternative networks is not what Congress

had in mind when it drafted the 1996 Act. See, e.g., S. Conf. Rep. No. 104-230, at 1 (1996) (Act "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies"); Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, Amendment of the Comm'n's Rules to Establish Competitive Serv. Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Servs., 11 FCC Rcd 16639, 16678-79, ¶ 80 (1996) ("The interconnection provisions of the Act, Sections 251 and 252, are designed to promote facilities-based local exchange competition").

**B. At An Absolute Minimum, The Commission Has The Legal Authority To Limit The Availability Of UNE Combinations To Carriers That Provide Both Local and Access Service To An End User Customer**

The 1996 Act contains no explicit requirement that incumbent LECs provide combinations of UNEs. *AT&T v. Iowa Utilities Bd.*, 142 L.Ed 2d at 858 ("[t]he reality is that § 251(c)(3) is ambiguous on whether leased network elements may or must be separated"). The Commission chose to read an obligation not to separate existing UNE combinations into section 251(c)(3) on the theory that such an obligation would speed the development of local competition. *Local Competition Order*, 11 FCC Rcd at 15647, ¶ 292.

Where the Commission uses its discretion to create an entitlement, it has the legal authority tailor that entitlement to accomplish its goals. As explained above, a link between access and local exchange services for access to UNEs furthers local competition, universal service and access reform goals. As the Commission observed in the *Supplemental Order*, linking the two will in no way harm the development of local competition, at a minimum where combinations are concerned. *Supplemental Order* at ¶

5. The Commission may legally place conditions on the UNE combination entitlement it created in order to best serve its local competition, access reform and local competition goals.

## **VI. MARKET REALITIES DEMONSTRATE THAT THERE IS NO LEGAL OR POLICY BASIS FOR GENERAL UNBUNDLING OF SPECIAL ACCESS NETWORK ELEMENTS**

The special access loop and transport facilities used to provide special access services (including dedicated switched transport and private line services) can not generally meet the unbundling standard set out in section 251(d)(2). As set out below, that section requires that impairment be measured against "the services the carrier seeks to offer." The simple fact that these providers have taken about one-third of special access services without a UNE in sight would seem to provide a full answer to the impairment question.

Continuing on to apply the impairment analysis mapped out in the *UNE Remand Order* to the market realities of these services confirms what the revenue numbers show. The analysis reveals that alternative carriers have been and continue to be unimpaired in their ability to offer service without incumbent LEC UNEs. Further, special access providers have long passed the stage where UNEs could have filled the pro-competitive role the Commission has assigned to them in the local exchange market.

### **A. The Commission's Policy Rationale For Creating UNEs Does Not Fit Special Access**

The Commission has identified two pro-competitive roles that UNEs may play. First, UNEs provide a means for carriers to win customers without the delay or risk involved in bringing their own facilities on-line. Second, UNEs allow alternative carriers to fill in their networks a piece at a time, using UNEs to fill in gaps. *UNE Remand Order*



at ¶ 6 (“the purchase of unbundled network elements would, at least in some situations, serve as a transitional arrangement until fledgling competitors could develop a customer base and complete the construction of their own networks”).

Because the provision of alternative access arrangements is not a business of “fledgling competitors,” the pro-competitive role for UNEs is absent here. UNEs are not needed to develop a customer base. The Commission has already concluded that “[t]he vast majority of purchasers of [incumbent LEC] interstate access services are telecommunications carriers, not end users.” *Local Competition Order*, 11 FCC Rcd at 15845, ¶ 873. Although creating access UNEs might allow IXC and others to artificially reduce the price they pay for service, it would not serve the UNE policy goal of allowing them to develop a customer base. These carriers already have the customer base and can build out facilities knowing they have customers in-hand.

Similarly, UNEs are not needed to allow alternative providers to fill in network gaps as they begin construction of “fledgling” alternative networks. Construction of alternative networks has been on-going for over fifteen years, and one or more are present in most every larger city. Where the market shows that alternative providers have already sunk investment into fiber facilities that broadly cover an MSA, UNEs are not needed to fill in gaps so service can be offered. The alternative networks are up and running. Any additional extensions (e.g. connections to a particular customer) can be added as part of the normal construction process. UNEs are more likely to discourage further facilities build-out in this situation than to make it easier.

**B. Carriers Seeking To Offer Special Access Services Are Not Impaired Without Incumbent LEC UNEs**

The Commission has long recognized that there are alternatives to incumbent LEC special access services. Its analysis of incumbent LEC unbundling under section 251(d)(2) must take into account these alternatives and the degree to which they have been used, for many years, to enable carriers to successfully offer alternative service. Ubiquitous alternatives to incumbent LEC special access services exist throughout, at least, a broad range of MSAs. In these MSAs, unbundling incumbent LEC facilities would not be consistent with section 251(d)(2) or the Commission's local competition policies.

**1. The Commission's Analysis Must Take Into Account The Access Services That Carriers Are Seeking To Offer Here**

Section 251(d)(2) requires that impairment be measured against "the services the carrier seeks to offer." 47 U.S.C. § 251(d)(2). This requires that impairment be measured against the ability to offer special access services separately from the ability to offer local exchange services because there is such a marked distinction between the two services. This distinction is well recognized in the Act, long-standing Commission regulatory policy, and, most importantly, in the market.<sup>27</sup> For example, facilities-based by-pass of incumbent LEC access networks predated facilities-based local competition by more than ten years. As a result more special access alternatives are available and the

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<sup>27</sup> The fact that the Commission must analyze access services separately from local exchange service based on long-standing market and regulatory distinctions between the two hardly suggests that the Commission must do so for every imaginable service that a requesting carrier might seek to offer. At a minimum, the Commission can treat services with similar characteristics as a single group. *In the Application of NYNEX Corporation, as transferor, and Bell Atlantic Corporation, as Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20016-7 (1997).

processes and procedures for ordering and provisioning those alternative services are well developed. *AT&T Reply Comments* at 125, n. 256 (“CLECs for many years have had internal processes in place for analyzing and ordering special access”). Finally, a service-related distinction between switched and dedicated services like special access makes compelling technological and economic sense.

In the *UNE Remand Order*, the Commission elected to make a customer-based distinction rather than one based on service. *UNE Remand Order* at ¶ 81. The Commission recognized that because certain types of customers order certain types of services, the two approaches may yield similar results. This is certainly true here, where special access services are ordered by carriers and larger business customers. Mass market customers do not order special access services. Whether separated based on the customer or the service, the distinction between special access and its customers and mass market local exchange service and its customers reflects basic market realities. As the Commission has often remarked, CLECs have focused their competitive energies on constructing facilities to provide service to the more lucrative business market. *UNE Remand Order* at ¶¶ 5-6 (contrasting alternative switch and fiber deployment between larger business and mass market). Because the impairment analysis requires assessment of alternatives and self-provisioning possibilities, the Commission must account for the fact that alternatives are more prevalent for larger customers seeking special access services than for others.

**2. Analysis Under The Commission's *UNE Remand Order* Framework Demonstrates That Requesting Carriers Are Not Impaired In Their Ability To Offer Special Access Services Without Incumbent LEC UNEs In Many Large MSAs**

The *UNE Remand Order* sets out a framework for analysis under section 251(d)(2).<sup>28</sup> The goal of that analysis is determining whether alternatives to incumbent LEC facilities are actually available on a “practical, economic and operational” basis. The success of alternative providers at winning a large part of special access revenues would seem to prove that their networks are “practical, economic and operational” substitutes for incumbent LEC networks.

The Commission's *Pricing Flexibility Order* is only the latest of a long series of Commission orders recognizing that alternatives to incumbent LEC special access services are available. Although the Commission has noted that the conclusions reached in the *Pricing Flexibility Order* do not necessarily determine the results of an unbundling analysis, *UNE Remand Order* at ¶ 341 n.673, the *Pricing Flexibility Order*, because it is tailored to special access and service to larger businesses, provides useful input into any unbundling decision concerning special access. Of particular note, where the *Pricing Flexibility Order*'s Phase I test is met, competitors are deemed to have made an “irreversible, sunk investment” in providing facilities-based alternatives. *Pricing Flexibility Order* at ¶ 14. At this point, “competitors are sufficiently entrenched in the market” that they cannot be driven out. *Id.* at ¶ 77. The presence of such alternatives is

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<sup>28</sup> BellSouth does not necessarily subscribe to the Commission's multi-part analysis, but applies it here as an example.

precisely what the Supreme Court required the Commission to look to in analyzing impairment.

Applying the Commission's *UNE Remand Order* analysis, informed by the *Pricing Flexibility Order* and the facts developed here and in the *Special Access Report*, demonstrates that no blanket unbundling of incumbent LEC special access network facilities meets section 251(d)(2). The following applies the essential elements of the Commission's *UNE Remand Order* impairment analysis to special access.

**a. Ubiquity**

A key inquiry under the *UNE Remand Order* is into whether alternatives to incumbent LEC facilities are sufficiently ubiquitous to create a "practical, operational and economic" alternative. Fortunately, the Commission's *Pricing Flexibility Order* developed "an easily verifiable bright-line test" to accomplish this in the special access world. *Pricing Flexibility Order* at ¶ 78.<sup>29</sup>

Phase I of the *Pricing Flexibility Order* established a test to measure the breadth of special access alternatives within an MSA.<sup>30</sup> Where this test is met, special access alternatives are found to be available broadly throughout an MSA.<sup>31</sup> The *Special Access Report* details the results of applying this test. *Special Access Report* at 8-10.

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<sup>29</sup> The test has Phase I and Phase II triggers for regulatory relief. Both triggers measure whether sufficient alternatives are present by examining the extent of collocation by alternative transport providers. *Pricing Flexibility Order* at ¶ 82.

<sup>30</sup> MSAs "best reflect the scope of competitive entry, and are therefore a logical basis for measuring the extent of competition." *Pricing Flexibility Order* at ¶ 72.

<sup>31</sup> The Phase I test sets a higher threshold for channel terminations than it does for transport. Compare *Pricing Flexibility Order* at ¶¶ 93 and 100. Where this higher threshold is met, the test supports the broad availability of alternative loops in addition to transport.

A conclusion that special access alternatives are broadly available is entirely consistent with the *UNE Remand Order* finding that ubiquitous loop and transport alternatives were not available for purposes of providing local exchange service. The conclusions simply reflect key differences between special access and mass market local exchange services.<sup>32</sup>

First, as discussed above, special access customers are, geographically, highly concentrated in denser urban areas. Alternative providers can achieve ubiquitous coverage of these high-revenue geographic areas without blanketing an entire MSAs, including, in particular, the outlying low-revenue areas.<sup>33</sup> The *UNE Remand Order* recognized that alternative loops and transport were available to serve large business customers in urban areas, precisely the special access customer base. *UNE Remand Order* at ¶¶ 184-86, 341.

Second, connecting incumbent LEC wire centers through interoffice transport may be important to mass market local competition, but it is not essential to special access competition. As the Commission has noted, the direct connections that many alternative access providers have constructed between end users and carriers provide alternatives without touching incumbent LEC wire centers. *Pricing Flexibility Order* at ¶ 104 (the test is a “conservative measure of competition” because it ignores alternative providers that choose not to collocate in incumbent LEC wire centers).

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<sup>32</sup> The Commission’s local transport and loop conclusions were driven by its concern over mass market competition, requiring, in the Commission’s analysis, coverage of essentially every wire center in an MSA. *UNE Remand Order* at ¶ 184-86, 332.

<sup>33</sup> Thus, the Commission’s conclusion that “there are few, if any, alternative transport facilities outside the incumbent LECs’ networks that connect all or most of an incumbent LEC’s central offices,” *UNE Remand Order* at 343, is not determinative here, where all the evidence shows that customers are concentrated in a relatively small number of

Finally, any perceived lack of alternatives on routes between incumbent LEC wire centers, or from wire centers to POPs<sup>34</sup> may be due more to a lack of information than an absence of meaningful special access alternatives. The Commission has noted more than once that alternative carriers have not supplied the information necessary to make informed judgments on the presence of alternatives. *See, e.g., Pricing Flexibility Order* at ¶ 96. The Commission cannot continue to encourage carriers to withhold information. Based on fifteen years of active construction of networks to by-pass incumbent LEC special access services and the typical alternative provider business plans quoted above, the Commission should presume that broad alternatives exist unless the facts demonstrate the contrary.

**b. Cost and Time**

The cost and time of self-provisioning alternatives are factors in the Commission's unbundling analysis. *UNE Remand Order* at ¶¶ 355-364. In the *UNE Remand Order*, the Commission concluded that the cost and time to construct a network matching the scope of an incumbent LEC's entire interoffice transport network in order to offer service to a "broad base of consumers" weighed in favor of unbundling. *UNE Remand Order* at ¶ 355. Of course, a ubiquitous special access alternative in no way requires reaching a "broad base of consumers," none of whom purchase special access. Instead, existing special access networks can be extended to the relatively small number of customers relatively easily. Given the sharp distinction between the dense concentration of special access customer and the broad dispersion of mass market local

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incumbent LEC central offices. Connecting "all or most" central offices is absolutely unnecessary when it comes to special access services.

<sup>34</sup> *UNE Remand Order* at ¶ 348.

exchange service customers, the *UNE Remand Order*'s conclusions on cost and time are not applicable here.<sup>35</sup>

**c. Functionality and Quality**

The *UNE Remand Order* concluded that “requiring carriers to utilize alternative sources of transport imposes functional and quality disadvantages” on requesting carriers because they would be forced to use a patchwork of alternative suppliers. *UNE Remand Order* at ¶ 365. Again, however true this could be for purely local, interoffice transport, years of experience in special access demonstrates otherwise. Alternative carriers lay claim to more modern, higher quality networks than those used by the incumbent LECs. IXC's, for example, have been affirmatively choosing to use a “patchwork” of incumbent LEC and alternative providers to reach end user customers for many years. The systems for utilizing multiple providers of special access are well established and present no handicap. *ATT Reply Comments* at 125 n.256. These market choices demonstrate that functionality and quality are not threatened by using multiple providers for access service.

**d. Goals of the Act**

As set out above, creating an entitlement to UNEs for special access service unlinked to the provision of local exchange service would run counter to the Commission's local competition goals. IXC's, for example, would order special access as UNEs, limiting the availability of revenues and facilities to CLEC's interested in

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<sup>35</sup> The *UNE Remand Order* rejected incumbent LEC cost models illustrating that the costs of building alternative transport networks did not rise to the level of impairing network builds because the models did not reconcile other Commission cost information. *UNE Remand Order* at ¶ 359. However, the Commission cited no evidence that even the higher costs it cited would impair any carriers ability to offer service, let alone special access services.



providing local service. Forcing TELRIC prices on the special access market would quickly devalue alternative provider investment in facilities, and reduce their incentives to continue to invest. Finally, the Competitive Checklist, often used by the Commission as a barometer of what Congress judged to be competitively important network elements does *not* suggest in any way that dedicated, special access facilities should be unbundled. Rather, Congress focused on requiring unbundled access to switched elements not to the dedicated ones at issue here. *See* 47 U.S.C. § 271 (c)(2)(B)((iv),(v).

## **VI. CONCLUSION**

For the reasons set out above, BellSouth urges the Commission to continue to firmly link (to the benefit of local competition) local exchange and exchange access competition by conditioning the availability of UNEs for access service on the provision of local service to the end user until universal service and access reform are completed.

At that time, access to UNEs may be made available to the extent consistent with section 251(d)(2).

Respectfully submitted,

**BELLSOUTH CORPORATION  
BELLSOUTH TELECOMMUNICATIONS, INC.**

By Their Attorneys:

A handwritten signature in black ink, appearing to be "M. Robert Sutherland" and "Jonathan B. Banks", written over a horizontal line.

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Date: January 19, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19<sup>th</sup> day of January, 2000, caused a copy of the foregoing ***BELLSOUTH COMMENTS ON FOURTH FURTHER NOTICE*** to be served by hand-delivery to all parties to this action addressed to the following:

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